

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

25733

FILE: B-210872**DATE:** July 13, 1983**MATTER OF:** Sermor, Inc.**DIGEST:**

1. Where procuring agency finds a small business nonresponsive, and the Small Business Administration subsequently refuses to issue a Certificate of Competency, GAO generally will not review the agency's determination of nonresponsibility.
2. Where protester shows that possible fraud or bad faith on the part of Government officials may have caused the Small Business Administration to decline to issue a Certificate of Competency, GAO will review the matter. But when protester fails to present irrefutable proof that the officials acted with a specific and malicious intent to injure the protester and fails to demonstrate that the alleged fraud or bad faith caused SBA to deny the Certificate of Competency, then GAO will deny the protest.

Sermor, Inc. protests the contracting officer's determination that the firm was nonresponsive and the Small Business Administration's (SBA's) refusal to issue a Certificate of Competency in connection with a procurement for helicopter ground trucks by the U.S. Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri. We deny the protest.

Sermor, the apparent low bidder under solicitation No. DAAJ09-83-B-A037 (PRF), was found nonresponsive based on a preaward survey showing unsatisfactory production capability, performance record, and financial capability. The Defense Contract Administration Services Management Area (DCASMA) which conducted the survey concluded that Sermor would not be able to meet required delivery schedules.

Since Sermor is a small business concern, the Army referred the matter to the SBA, forwarding to it a copy of

026148

the preaward survey with its "no award" recommendation, along with the invitation for bids, the abstract, and specifications and drawings. The SBA refused to issue a Certificate of Competency, and the Army therefore awarded a \$252,840 contract to Equus Tool Corporation, the next lowest, responsive, responsible bidder.

Sermor denies that it is nonresponsive. Instead, Sermor contends that Government officials, including those of DCASMA, in Orlando, Florida, have "fraudulently perpetrated and given out faulty information on Sermor." As a result, Sermor alleges, SBA was unable to make a realistic decision as to whether to issue a Certificate of Competency.

When an agency determines that a small business concern is nonresponsive, it must refer the matter to SBA before the small business bidder can be precluded from award. SBA has statutory authority to make final disposition as to all elements of responsibility. 15 U.S.C. § 637(b)(7)(A) (Supp. IV 1980). Therefore, we generally will not review a contracting officer's determination that a small business concern is nonresponsive where the SBA affirms that determination by refusing to issue a Certificate of Competency. Jechura's Military Equipment Company, B-209996, December 15, 1982, 82-2 CPD 539.

We will, however, review the matter when, as here, the protester has shown that Government officials may have acted fraudulently or in bad faith. Id. Under these circumstances, protesters bear a very heavy burden of proof and must present irrefutable evidence that the officials acted with a specific and malicious intent to injure them. See Marine Industries Northwest, Inc.; Marine Power and Equipment Company, B-208270, B-208315.2, February 16, 1983, 62 Comp. Gen. ___, 83-1 CPD 159. Here, Sermor made the requisite initial showing in support of its allegation and we therefore have reviewed the matter. We now conclude, however, that Sermor has not shown that in fact the SBA's refusal resulted from fraud or bad faith on the part of Government officials.

Sermor argues that it has the most productive and efficient, technically advanced machine capability in the Southeast. DCASMA, however, based its conclusion that Sermor's production capability was unsatisfactory not on deficiencies in Sermor's equipment, but rather on the

lack of the management and production controls necessary to utilize this equipment and to assure the successful, timely completion of the contract. We find neither fraud nor bad faith in this determination.

Sermor's unsatisfactory performance record was documented in the preaward survey, which showed that eight of its ten current contracts were delinquent under original performance schedules, and six of these were delinquent under revised schedules. Even if, as Sermor contends, performance of one of these contracts was timely under a revised, mutually-agreed upon schedule, with any delay under the original schedule caused by the Government, this does not explain the delinquency on the other contracts. We previously have found that a determination of nonresponsibility based on a high rate of delinquencies may be reasonable even though some of these were caused by the agency. See Amco Tool & Die Co., B-207191, February 28, 1983, 62 Comp. Gen. , 83-1 CPD 246. Sermor therefore has not shown that DCASMA acted fraudulently or in bad faith in representing Sermor's performance record to be unsatisfactory. Further, once recent unsatisfactory performance was found, contracting officials were required to consider its impact on the current procurement before determining responsibility. Defense Acquisition Regulation §§ 1-902 and 1-903.1(iii) (1976 ed. and Defense Acquisition Circular No. 76-40, November 26, 1982).

As for financial capability, Sermor argues that Government progress payments might have covered most of the cost of performance of the protested contract. The record, however, indicates that the Army had suspended Sermor's progress payments under current contracts and was considering a demand for repayment of \$85,000 in overpayments. Sermor itself apparently informed the Government that the suspension of progress payments would adversely affect its ability to complete its present contracts. We believe DCASMA reasonably concluded that the suspension also would affect Sermor's ability to perform any contract awarded under this solicitation.

In any case, we note that SBA conducted an independent investigation, including visits to Sermor's plant, that revealed continued delinquencies on current contracts and raised doubts as to Sermor's financial condition. Based upon these factors, SBA declined to issue the Certificate of Competency. Thus, it appears that the COC

B-210872

denial was not based on information or conclusions of DCASMA, but on SBA's review of the situation.

The protest is denied.

for Harry D. Van Cleave
Comptroller General
of the United States